

**UNITED STATES COPYRIGHT ROYALTY JUDGES**  
**The Library of Congress**

*In re*

Determination of Royalty Rates and Terms  
for Transmission of Sound Recordings by  
Satellite Radio and “Preexisting”  
Subscription Services (SDARS III)

Docket No. 16-CRB-0001-SR/PSSR (2018–  
2022) (Remand)

**MUSIC CHOICE’S MOTION FOR AN EXTENSION OF DEADLINE TO FILE  
WRITTEN REPLY SUBMISSION**

Music Choice respectfully submits this Motion pursuant to 17 U.S.C. § 801(c) and 37 C.F.R. §303.7(b) for an Order extending the deadline by which Music Choice must file its responsive brief and accompanying documents, as set forth in the Judges’ December 8, 2020 Order Approving Joint Proposed Schedule for Proceedings on Remand (Dkt. No. 23380 at 2). Music Choice’s responsive filing is currently due on July 30, 2021. Music Choice requests that deadline be extended to a date that is 20 days after the later of (1) the Judges’ issuance of a decision on Music Choice’s pending Motion to Compel discovery; or (2) SoundExchange’s production of documents sought by that Motion, if the Judges order such production.

Music Choice needs this extension to avoid any unfair prejudice from SoundExchange’s withholding of various documents responsive to its discovery requests, which are subject to Music Choice’s pending Motion to Compel, Dkt. 23887. The improperly withheld documents are needed to rebut certain testimony submitted by SoundExchange with its opening brief.

**Procedural Background**

On April 29, 2021 Music Choice moved to compel the production of documents responsive to its RFP No. 12 related to a 2017 investigation and evaluation of Music Choice’s

defensive audits. This investigation was conducted by SoundExchange’s forensic accountant, Lewis Stark, and SoundExchange had indicated its intent to submit testimony from Mr. Stark based upon this 2017 investigation. Yet SoundExchange improperly withheld all documents concerning that investigation on general and unspecified privilege grounds. *See* Dkt. 23887. Music Choice argued that it seemed likely that Mr. Stark had provided some form of written report on his investigation to SoundExchange, having spent months conducting that investigation. SoundExchange had not specified the actual grounds for its privilege claims, or even identified the documents withheld, but Music Choice established that even if some of the documents relating to the 2017 investigation were privileged, SoundExchange had waived the privilege by placing Mr. Stark’s evaluation of the Music Choice defensive audits – based on that very same 2017 investigation – at issue in the proceeding. *Id.*

In its opposition to Music Choice’s Motion to Compel, SoundExchange made general allegations regarding privilege, **limited solely to claims of attorney work product privilege**, but still did not identify or enumerate the actual documents it was withholding, much less make any privilege showing specific to any of those documents. Instead, it claimed that “there simply is no treasure trove of documents.” Dkt. 23906 at 5. It even went so far as to specifically quote Music Choice’s “presumption” that “Mr. Stark and Prager Metis provided SoundExchange with some written report, communications, or other form of analysis of their findings. . .” and represent to the Court with respect to this presumption that “[a]gain, Music Choice is wrong.” *Id.*

Following briefing on Music Choice’s Motion, on May 27, 2021 the Judges gave SoundExchange another chance to support its privilege claims, which were not adequately specified in its briefing, and ordered SoundExchange to produce a privilege log explaining the grounds for withholding each of the documents sought. Dkt. 25317. Notably, that privilege log

shows that SoundExchange is withholding twelve documents related to Mr. Stark’s investigation, including some of the exact types of documents Music Choice “presumed” existed – and which SoundExchange denied existed. Dkt. No. 25332. Also notable, the privilege log for the first time enumerated various boilerplate privilege claims going beyond the attorney work product privilege, claims which SoundExchange did not even mention in its briefing. Included in these newly invoked privilege claims, SoundExchange sought to assert claims of “accountant-client privilege” – a privilege that is not recognized in federal court. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-818 (1984) (noting that extending such a privilege to an independent accountant would undermine the public interest in the independence of CPAs); *Couch v. United States*, 409 U.S. 322, 335 (1973) (“... no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases.”). Finally, the entire privilege log was improperly filed as “Restricted,” with the **entire** log redacted. But there can be no valid basis for abusing the protective order provisions to redact any of the information on this privilege log, which by definition is supposed to contain non-privileged information sufficient for the reader to evaluate the privilege claims logged. Nor did SoundExchange submit any declaration supporting those redactions. Redacting the entire log is indefensible.

Upon reviewing that log, the Judges determined that they were “unable to ascertain the applicability, *vel non*, of any of the asserted privileges from a reading of the privilege log,” and issued another Order on June 16, 2021, instructing SoundExchange to provide the withheld documents for *in camera* review within five days. Dkt. 25337. On June 30, 2021, SoundExchange filed its opening remand submission, including a declaration from Mr. Stark on the very topic for which SoundExchange seeks to invoke privilege – his assessment of the

sufficiency of Music Choice's audits based upon his 2017 investigation of those audits. *See* Decl. of Lewis Stark, Dkt. No. 25375, ¶¶ 6-11.

On July 1, 2021 – a full ten business days after the Judges' Order instructing SoundExchange to submit the withheld documents, and only after the Parties had filed their opening briefs – Music Choice became aware, through emails between this Court and SoundExchange, that due to a technical error in the CRB notification system, SoundExchange (having apparently not monitored the docket proactively) had not received notice of that Order, and had never provided the documents for the Judges' review. By Order dated July 2, 2021, the Judges re-directed SoundExchange to provide those documents for review within five days. Dkt. No. 25420. Those documents are now due to be submitted on Monday, July 12, 2021.

### **SoundExchange's Position**

Music Choice has sought SoundExchange's consent to the requested extension as required by 37 C.F.R. § 303.7(b). SoundExchange refuses to grant such consent unless Music Choice agrees to file its responsive brief by August 17, 2021, irrespective of whether the Judges have ruled on Music Choice's Motion to Compel or SoundExchange has made any mandated production before that date. Music Choice cannot agree to the arbitrary limitation demanded by SoundExchange. Given that the new deadline for SoundExchange to submit the withheld documents for *in camera* review is now July 12, an arbitrary cutoff of August 17 would carry the potential to altogether deprive Music Choice of the very relief sought in its Motion to Compel and therefore defeat the purpose of this Motion.

### **Argument**

Music Choice timely moved to compel the production of certain key documents necessary for its evaluation and rebuttal of the testimony of Lewis Stark – SoundExchange's sole

witness on the royalty audit issue on remand. If SoundExchange in its Opposition brief had met even the minimal burden of actually identifying the documents it was withholding and explaining precisely why it believed each document was privileged, the Motion likely would have been decided by now. Indeed, if SoundExchange had submitted an adequate privilege log after the Judges gave it a second chance to meet its burden the Motion might have been decided by now. And SoundExchange's failure to monitor the docket led to yet another delay in deciding the Motion. None of these delays were caused by Music Choice. To allow these delays to effectively deprive Music Choice of the ability to actually use the very discovery sought in the Motion would be manifestly unfair.

Given the significant time constraints at hand, where Music Choice's written responsive submissions are due on July 30, 2021 and where SoundExchange has not yet even submitted the documents in question for *in camera* review, let alone produced to Music Choice any documents the Judges may eventually determine were improperly withheld, Music Choice respectfully requests that the Judges adjust the schedule in this proceeding pursuant to their authority under 17 U.S.C. § 801(c). While Music Choice well recognizes the importance of a timely resolution of this remand, it should not be forced to rush its preparation of its rebuttal or forego the opportunity to include potentially probative evidence due to circumstances not of its own making.

Although SoundExchange attempted to deny the existence of these documents, it is now clear that several documents – apparently including a formal memo setting out Mr. Stark's purported findings from his 2017 investigation – exist and are being withheld improperly. And now that the opening briefs have been filed, it is equally clear that Mr. Stark is testifying based upon his 2017 investigation. Declaration of Lewis Stark, Dkt. No. 25375, ¶¶ 6-11. There is no

doubt left that at least some of the withheld documents are highly probative and must be produced to Music Choice. Even if some were initially privileged – and Music Choice has seen no persuasive argument as to why they were – SoundExchange has chosen to put the subject matter of all of these documents squarely at issue in this proceeding.

The length of the requested extension is necessary to ensure that Music Choice is provided a fair opportunity to present its rebuttal case. At this point, even were Music Choice’s Motion to Compel to be granted in whole or in part within a week of SoundExchange’s upcoming *in camera* submission, it would not provide Music Choice adequate time to fully evaluate and incorporate any new evidence produced into its responsive submission under the current schedule. Denying Music Choice additional time to review and incorporate into its responsive submission any documents that the Board subsequently orders SoundExchange to produce would therefore render that relief ineffective, and will prejudice Music Choice’s ability to most fully document the flaws in SoundExchange’s remand arguments.

In contrast, extending Music Choice’s reply filing deadline as proposed to enable Music Choice to diligently evaluate and incorporate any such documents in its responsive submissions alongside other arguments in those submissions, will also provide for the most efficient and streamlined process in this remand proceeding. *See* 37 C.F.R. § 303.8 (noting that the regulations of the Copyright Royalty Judges “are intended to provide efficient and just administrative proceedings”).

With the reply submission deadline nearing, Music Choice respectfully requests that the Judges expeditiously rule that the deadline for Music Choice to file its written reply briefs and rebuttal evidence be extended to 20 days after the later of (1) the Judges’ issuance of a decision on Music Choice’s pending Motion to Compel; or (2) SoundExchange’s production of

documents sought by that Motion, if the Judges compel such production, to allow Music Choice to incorporate the information therein into its reply submissions. A Proposed Order is attached.

Dated: July 8 , 2021

Respectfully submitted,

/s/ Paul M. Fakler

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# Proof of Delivery

I hereby certify that on Thursday, July 08, 2021, I provided a true and correct copy of the Music Choice's Motion for an Extension of Deadline to File Written Reply Submission to the following:

Sony Music Entertainment, represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

SAG-AFTRA, represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

American Association of Independent Music ("A2IM"), represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

SoundExchange, Inc., represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

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Signed: /s/ Paul Fakler